Seascope Sdn Bhd v Syed Izhar bin Syed Syed Salleh

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5–22–1114 OF 1998
RAMLI ALI J
13 FEBRUARY 2006

Contract — Formation — Call option agreement — When contract came into existence — Offer and acceptance — Whether there was communication of acceptance — Whether communicated after option period has expired — Whether there was valid and binding contract

Contract — Illegality — Restitution — Recovery of advancement made by plaintiff — Whether defendant derived benefit personally — Whether it would be unjust to allow the defendant to retain the benefit

Contract — Illegality — Call option agreement — Whether call option was not enforceable being a sham and/or illegal in that it's purpose and object was to secure payment for moneylending — Moneylenders Act 1951 ss 2(a)(h), 3

This case arises from the financial predicament of a company known as Trimula Development Sdn Bhd ('Trimula'). From 1996, this company was in financial distress that culminated in Special Administrator being appointed under the Danaharta Act 1998. In 1996, one Dato' Lim Geok Bak (Dato' Lim), a substantial shareholder and director of the plaintiff and one LGB Engineering Sdn Bhd, first using LGB Engineering Sdn Bhd, then the plaintiff, wanted to invest in Trimula. Trimula at that material time, had some potentially valuable rights to land in Langkawi. Initially, Dato' Lim agreed that he would take up a shareholding in Trimula by way of new shares to be issued in an enlarged capital of Trimula. But, Trimula needed working capital to carry itself through until such time as a proper value could be put to Dato' Lim's proposed investment in Trimula. Dato' Lim used the plaintiff to channel money to Trimula, which was all recorded by the plaintiff as loans to Trimula. However, in late 1996 or early 1997, Dato' Lim no longer wanted to invest in Trimula and reneged upon his earlier agreement to do so. By then, he knew that he could not collect any of the monies loaned to Trimula as Trimula was in financial distress. What the plaintiff sought to do was to recover that money from the defendant who was a director and shareholder of Trimula at the material time. The plaintiff's claim against the defendant is for a sum of RM4,825,000 based on a Call Option Agreement which the plaintiff claimed was duly executed by the defendant which acknowledged the defendant's obligations on the said sum. On the defendant's part, the defendant contended that the said Call Option Agreement which was forwarded on 4 February 1997 was an offer by the plaintiff ('the Offer') and that the Offer was only capable of being accepted by the

defendant before 30 June 1997 (the date the Call Option expired) and that as there was no communication of acceptance by the defendant before 30 June 1997, the offer was revoked by the plaintiff as the time prescribed to accept the Offer, or reasonable time, had lapsed. In addition it was also contended by the defendant that Call Option was not enforceable being a sham and/or illegal in that it's purpose and object was to secure payment for its moneylending to Trimula.

Held:

(1) As a matter of fact and law, in the present case, it cannot but be the case that acceptance of the Offer must be before 30 June 1997, as that was clearly set out in the said Call Option Agreement as being the date when the option for the plaintiff to call upon the defendant to sell his shares to the plaintiff expires. Any acceptance after this would be ineffective as the main purpose of the contract, namely the Call Option could no longer be exercised (see para 20).

(2) The evidence in the present case was that the communication of the acceptance was only done in January 1998, that was some six months after the option under the said Call Option Agreement expired. Therefore, there was no acceptance to the offer and consequently there was no valid and binding contract as alleged by the plaintiff. There being no contract, there was also no question of breach nor frustration nor lack of consideration, nor non-completion of the said Call Option Agreement, entitling the plaintiff to claim directly from the defendant (see para 21).

(3) It cannot be said that the payment of the further RM1.5 million to Trimula constituted an acceptance by the defendant of the terms of the said Call Option Agreement. This was especially so considering the background to the previous loans from the plaintiff to Trimula. Accordingly, the only reasonable conclusion to reach was that as recorded by the plaintiff itself and as in the plaintiffs audited statutory accounts - that is that the sum of RM1.5 million was a loan to Trimula. It remained as a loan to Trimula until and unless the defendant accepted the terms of the said Call Option Agreement. This the evidence showed the defendant did not. Therefore, the said Call Option Agreement did not exist as a valid and binding contract between the parties and therefore not enforceable (see para 33).

(4) The defendant derived no benefit personally, and second, that it cannot be said that it would be unjust to allow the defendant to retain the benefit when he did not take one (see para 34). All the evidence, whether it be led by the plaintiff or the defendant and contemporaneous documents make it explicit that: (1) the plaintiff or Dato' Lim at the times the advances were made to Trimula, were intent upon taking up a shareholding in an enlarged capital of Trimula and not purchasing the entire shareholding of the defendant; (2) the plaintiff or Dato' Lim intended, at the times the advances to Trimula were made, to treat those advances as loans to Trimula which it would then convert into share capital in Trimula; (3) the defendant when requested the advances to Trimula did so in his capacity as director of Trimula for the benefit of Trimula; (4) no monies were ever sought by or paid to the defendant for his own benefit; (5) all the advances were made directly to Trimula and booked into the

accounts of the plaintiff as loans to Trimula; and (6) all the advances were used exclusively by Trimula to pay its creditors (see para 35).

(5) All the evidence in the present case if read as a whole pointed to only one person making the decisions relating to the advances, ie Dato' Lim, and no one else (see para 64). The plaintiff conceded that although the said Call Option Agreement mentioned that the Deposit was RM4,825,000, in actual fact only RM4,500,000 was paid out. The plaintiff also accepted that the difference was interest. Therefore, the presumption under section 3 of the Moneylenders Act 1951 ('the Act') may apply ie any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender (see para 67).

(6) The exemption in section 2(a)(h) of the Act did not apply to rebut the presumption on the basis that the plaintiff was engaged in other substantial business and that this was purely an investment or was covered by. If the corporate veil was lifted and the evidence as to the true purpose of the Call Option Agreement was analysed, it did not rebut the presumption as it was Dato' Lim who was the unlicensed moneylender and not the plaintiff (see para 71).

(7) The evidence was compelling that there was some degree of system and continuity in Dato' Lim's moneylending activities. Apart from this, the defendant had also led evidence of 3 further loans granted by Dato' Lim, for which he charged interest. There was also documentary evidence of these loans in the form of written agreement. These evidence satisfactorily showed that Dato' Lim was on unlicensed moneylender (see para 73).

(8) What really demonstrateed the true purpose of the said Call Option Agreement was the document showing the interest rate calculation. A careful study showed that interest on the loans to Trimula was calculated until 30 June 1997. The total figure owing was calculated a RM4,825,000. Given the fact that Dato' Lim intended not to further invest, clearly he intended not to exercise the option to purchase the defendant's shares but instead to demand the sum of RM4,500,000 loaned to Trimula together with interest of RM325,000 from the defendant (see para 77).

(9) As such, whilst the said Call Option Agreement appeared prima facie to be about the purchase of the defendant's shares, given that Dato' Lim was meant to convert the loans into shares and given that he no longer wished to invest in Trimula, the true purpose of the Call Option Agreement was to allow him to recover monies lent to Trimula from the Defendant with interest. The Call Option Agreement was therefore a sham agreement (see para 79).

(10) Accordingly, if the true purpose of the Call Option Agreement was revealed and the corporate veil was lifted, the transaction in question was a moneylending transaction where the Call Option Agreement was a moneylending contract which was unenforceable. This was an appropriate case to lift the corporate veil. On all the evidence, the Call Option Agreement was

A a moneylending transaction by Dato' Lim. The sham contract was not enforceable because Dato' Lim is not a licensed moneylender under the Act (see para 81).

[Bahasa Malaysia summary

B

Kes ini timbul daripada keadaan kewangan sesebuah syarikat yang agak membimbangkan. Syarikat ini dikenali sebagai Trimula Development Sdn Bhd. Semenjak 1996, syarikat ini berada dalam keadaan yang agak mencemaskan/membimbangkan dengan perlantikan Pentadbir Khas ('Special Administrator') di bawah Akta Danaharta 1998. Pada tahun 1996, C seseorang yang bernama Dato' Lim Geok Bak ('Dato Lim'), pemegang syer substansial dan pengarah plaintif dan syarikat yang dikenali sebagai LGB Engineering Sdn Bhd, mula-mula LGB Engineering Sdn Bhd dan kemudiannya plaintif ingin melabur di Trimula. Trimula, pada masa material mempunyai hak bernilai dan berpotensi ke atas tanah di Langkawi. Pada mulanya, Dato' Lim telah bersetuju D bahawa beliau akan memegang syer di Trimula melalui pembelian syer-syer baru yang diterbitkan di dalam ibukota, Trimula. Tetapi, Trimula memerlukan modal kerja untuk meneruskan kerjanya sehingga pada satu masa, di mana, nilai yang berpatutan boleh diberikan kepada pengusulan pelaburan Dato' Lim di Trimula. Dato' Lim telah menggunakan plaintif untuk menyalurkan wang kepada Trimula, yang mana E kesemuanya telah dicatatkan oleh plaintif sebagai pinjaman kepada Trimula. Tetapi, pada akhir tahun1996 atau awal tahun 1997, Dato' Lim tidak lagi ingin melabur di Trimula dan memungkiri janjinya ke atas perjanjiannya terdahulu untuk berbuat demikian. Pada masa itu, beliau mengetahui bahawa beliau tidak dapat mengumpul sebarang wang yang dipinjamkan kepada Trimula kerana Trimula berada dalam keadaan kewangan yang agak membimbangkan. Apa yang plaintif patut buat F adalah untuk mendapatkan wang daripada defendan yang merupakan pengarah dan pemegang syer Trimula pada masa itu. Tuntutan plaintif terhadap defendan adalah untuk jumlah RM4,825,000. Ini berdasarkan perjanjian opsyen panggilan yang plaintif tuntut telah dilaksanakan oleh defendan yang mana obligasi defendan ke atas jumlah tersebut telah diiktirafkan. Defendan telah menegaskan bahawa perjanjian opsyen panggilan yang ditujukan pada 4 Februari 1997 merupakan satu tawaran oleh G plaintif ('tawaran tersebut') dan tawaran tersebut hanya boleh diterima oleh defendan sebelum 30 Jun 1997 (tarikh opsyen panggilan tamat tempohnya). Seperti mana tidak wujud komunikasi persetujuan oleh defendan sebelum 30 Jun 1997, tawaran tersebut telah dibatalkan oleh plaintif seperti mana masa untuk menyetujui tawaran atau masa yang munasabah telah berlalu. Tambahan pula, telah ditegaskan oleh H defendan bahawa opsyen panggilan tidak boleh dikuatkuasakan yang mana merupakan satu penipuan dan/atau satu penyalahan undang-undang, di mana tujuan dan objektifnya adalah untuk menjamin bayaran bagi tujuan pinjaman kepada Trimula.

I

Diputuskan:

(1) Sebagai satu pernyataan fakta dan undang-undang didalam kes ini, penerimaan tawaran mestilah sebelum 30 Jun 1997, seperti mana ia telah dengan jelasnya dicatatkan di dalam perjanjian opsyen panggilan, dimana tarikh opsyen bagi

plaintif untuk memanggil defendan untuk menjual syernya kepada plaintif telah habis tempohnya. Sebarang persetujuan selepas ini akan menjadi kurang berkesan kerana tujuan utama kontrak terutamanya opsyen panggilan tidak lagi boleh digunakan (lihat perenggan 20).

(2) Keterangan di dalam kes ini adalah komunikasi penerimaan hanya dijalankan pada Januari 1998, iaitu enam bulan selepas opsyen di bawah perjanjian panggilan opsyen habis tempohnya. Oleh itu, tidak ada penerimaan kepada tawaran tersebut dan sejurusnya tidak ada pengikatan kontrak yang sah seperti yang telah diperkatakan oleh plaintif. Di mana tidak ada kontrak, juga tidak ada persoalan kemungkiran ataupun kekecewaan ataupun kekurangan pertimbangan ataupun ketidakpenyempurnaan perjanjian panggilan opsyen yang membolehkan plaintif menuntut secara langsung daripada defendan (lihat perenggan 21).

(3) Tidak boleh dikatakan bahawa bayaran tambahan RM1.5juta kepada Trimula merupakan satu penerimaan oleh defendan ke atas terma-terma perjanjian panggilan opsyen. Ini adalah sedemikian memandangkan latar belakang kepada pinjaman—pinjaman terdahulu plaintif kepada Trimula. Berikutannya, kesimpulan munasabah yang boleh dicapai adalah seperti yang direkodkan oleh plaintif dan seperti di dalam akaun berkanun audit plaintif — iaitu jumlah RM1.5juta adalah pinjaman kepada Trimula. Ia tetap merupakan pinjaman kepada Trimula sehingga dan melainkan defendan menerima terma-terma perjanjian panggilan opsyen. Malah, keterangan ini menunjukkan bahawa defendan tidak menerima terma-terma perjanjian panggilan opsyen. Oleh itu, perjanjian opsyen panggilan tidak wujud sebagai kontrak yang sah dan terikat antara parti-parti dan oleh itu tidak boleh dikuatkuasakan (lihat perenggan 33).

(4) Defendan tidak mendapat sebarang manfaat secara peribadi dan kedua ia tidak boleh dikatakan tidak adil untuk membenarkan defendan untuk mengekalkan manfaat apabila beliau tidak menerima sebarang manfaat pun. Kesemua keterangan, sama ada yang ditujukan oleh plaintif ataupun defendan dan dokumen-dokumen sezaman jelas menggambarkan bahawa: (1) plaintif atau Dato' Lim pada masa wang pendahuluan diberikan kepada Trimula berkeinginan untuk memegang syer di sesebuah ibu kota yang dikenali sebagai Trimula dan tidak membeli kesemua syer-syer defendan, (2) plaintif atau Dato' Lim berkeinginan pada masa wang pendahuluan kepada Trimula dibuat, untuk menjadikan wang pendahuluan sebagai pinjaman kepada Trimula, yang mana akan bertukar menjadi modal syer di Trimula; (3) defendan apabila meminta wang pendahuluan tersebut disalurkan kepada Trimula berbuat demikian atas kapasitinya sebagai pengarah Trimula bagi manfaat Trimula; (4) tiada wang dibayar oleh/ kepada defendan bagi manfaatnya sendiri; (5) semua wang pendahuluan telah dibuat secara langsung kepada Trimula dan telah ditempah ke dalam akaun plaintif sebagai pinjaman kepada Trimula dan (6) kesemua wang pendahuluan telah digunakan secara exklusif oleh Trimula untuk membayar pemiutang (lihat perenggan 35).

(5) Kesemua keterangan di dalam kes ini, jikalau dibaca secara keseluruhannya hanya ditujukan kepada seorang yang membuat keputusan berkaitan dengan wang pendahuluan, ie Dato' Lim dan tiada lagi. Plaintif mengaku bahawa

walaupun perjanjian panggilan opsyen menyatakan bahawa deposit adalah RM4,825,000, tetapi sebenarnya hanya RM4,500,000 dibayar keluar. Plaintif juga telah menerima bahawa perbezaannya adalah bunga. Oleh itu, andaian di bawah s 3 Akta Pemberipinjam Wang 1951('Akta tersebut') boleh digunakan ie sebarang orang yang meminjam wang sebagai balasan bagi jumlah yang lebih banyak untuk dibayar boleh diandaikan sehingga bertentangan dengan pemberipinjaman. (lihat perenggan 67).

(6) Pengecualian s 2(a)(h) Akta tidak digunapakai untuk mematahkan andaian bahawa plaintif terlibat dalam perniagaan yang lebih besar dan ini merupakan suatu palaburan. Jikalau perbadanan selubung dinaikkan ('corporate veil is lifted') dan keterangan mengenai tujuan sebenar opsyen panggilan perjanjian dianalisiskan, ia tidak mematahkan andaian kerana Dato' Lim yang merupakan peminjam yang tak berlesen dan bukannya plaintif (lihat perenggan 71).

(7) Keterangan tersebut menambat hati kerana wujud satu sistem dan kesinambungan dalam aktiviti-aktiviti pinjaman wang Dato' Lim. Selain daripada ini, defendan juga telah memberi keterangan tentang tiga pinjaman yang diberikan oleh Dato' Lim, di mana beliau telah mengenakan bunga. Terdapat juga bukti pinjaman berdokumen ini di dalam bentuk perjanjian bertulis. Keterangan ini menggambarkan bahawa Dato' Lim merupakan seorang peminjam wang yang tidak berlesen (lihat perenggan 73).

(8) Apa yang sebenarnya menggambarkan tujuan utama panggilan opsyen perjanjian adalah dokumen yang menunjukkan kadar pengiraan bunga. Satu pembacaan menunjukkan bahawa bunga atas pinjaman kepada Trimula telah dikira sehingga 30 Jun 1997. Jumlah keseluruhan yang dikira adalah RM4,825,000. Memandangkan Dato' Lim berkeinginan untuk tidak melanjut pelaburannya jelas sekali beliau berkeinginan untuk tidak melaksanakan opsyen untuk membeli syer-syer defendan tetapi untuk meminta jumlah RM4,500,000 yang dipinjamkan kepada Trimula bersama bunga RM325,000 daripada defendan (lihat perenggan 77).

(9) Dimana panggilan opsyen perjanjian adalah prima fasi tentang pembelian syer-syer defendan, Dato' Lim dikatakan telah menukarkan pinjaman kepada syer-syer dan memandangkan beliau tidak lagi ingin melabur di Trimula, tujuan sebenar opsyen panggilan perjanjian adalah untuk membenarkannya mendapatkan semula wang yang dipinjam kepada Trimula daripada defendan dengan bunga. Opsyen panggilan perjanjian adalah satu perjanjian palsu (lihat perenggan 79).

(10) Jikalau tujuan sebenar opsyen panggilan perjanjian didedahkan dan perbadanan selubung dinaikkan ('corporate veil lifted'), transaksi persoalan adalah merupakan satu transaksi pemberipinjam di mana opsyen panggilan perjanjian merupakan kontrak pemberipinjaman yang tidak boleh dilaksanakan. Ini merupakan satu kes yang sesuai untuk perbadanan selubung dinaikkan. Berdasarkan kesemua keterangan, panggilan opsyen perjanjian adalah pemberipinjaman transaksi oleh Dato' Lim. Perjanjian palsu tidak dilaksanakan kerana Dato' Lim bukan merupakan seseorang pemberipinjaman yang tidak berlesen di bawah Akta (lihat perenggan 81).]

Notes

For the case on restitution, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3699.
For cases on call option agreement, see 3(1)*Mallal's Digest*(4th Ed, 2003 Reissue) paras 3231– 3236.

Cases referred to

Chow Young Hong v Choong Fah Rubber Manufactory [1962] MLJ 74 (refd)
Lim Hwee Meng v Citadel Investment Pte Ltd (1998) SLR 601 (refd)
M' Iver v Richardson (1813) 1 M & S 557. (refd)
Preston Corporation Sdn Bhd v Edward Leong & Ors [1982] 2 MLJ 22 (refd)
Ramsgate Victoria Hotel Company Limited v Montefliore (LR) 1 Exch 109 (refd)
Selvaduray v Chinniah [1939] 8 MLJ 253 (refd)
Snock v London and West Riding Investment Ltd [1967] 2 QB 802 (refd)
Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324 (refd)
Waltersteiner v Moir [1974] 3 All ER 217 (refd)
William v Wilcox and Anor (1835–1842) QB 25 (refd)

Legislation referred to

Co-operative Societies Act 1948
Banking and Financing Institutions Act 1989 s 2(1)
Danaharta Act 1998
Evidence Act 1950 s 114(g)
Insurance Act 1963
Islamic Banking Act 1983
Moneylenders Act 1951 ss 2, 3, 2A(1)(h), 2(a)(h), 15
Pawnbrokers Act 1972
Takaful Act 1984

Logan Sabapathy (Slyvia Cotter with him) for the plaintiff.
Gopal Sreenivasan (Leong Phaik Leng)(Sivanathan) for the defendant.

Ramly Ali J:

GROUNDS OF JUDGMENT

[1] The plaintiff's claim against the defendant is for a sum of RM4,825,000 based on a call option agreement which the plaintiff's claims was duly executed by the defendant which acknowledged the defendant's obligations on the said sum. On the defendant's part, the defendant contends that the said call option is not enforceable being a sham and/or illegal in that it's purpose and object was to secure payment for its moneylending to a company known as Trimula Development Sdn Bhd (Trimula).

SUMMARY OF CASE

[2] This case arises from the financial predicament of a company known as Trimula Development Sdn Bhd (Trimula). From 1996, this company was in financial distress that culminated in Special Administrator being appointed under the Danaharta Act 1998. In 1996, one Dato' Lim Geok Bak (Dato' Lim), a substantial shareholder and

director of the plaintiff and one LGB Engineering Sdn Bhd first using LGB Engineering Sdn Bhd, then the plaintiff wanted to invest in Trimula (Dato' Lim died in October 2004). Trimula at that material time, had some potentially valuable rights to land in Langkawi. Initially Dato' Lim agreed that he would take up a shareholding in Trimula by way of new shares to be issued in an enlarged capital of Trimula. But, Trimula needed working capital to carry itself through until such time as a proper value could be put to Dato' Lim's proposed investment in Trimula. Dato' Lim used the plaintiff to channel RM450,000 to Trimula which was all recorded by the plaintiff as loans to Trimula. However, in late 1996 or early 1997, Dato' Lim no longer wanted to invest in Trimula and reneged upon his earlier agreement to do so. By then, he knew that he could not collect any of the monies loaned to Trimula as Trimula was in financial distress.

[3] What the plaintiff therefore seeks to do in this present case is to recover that money from the defendant who was a director and shareholder of Trimula at the material time.

CHRONOLOGY OF KEY EVENTS

[4] The chronology of key events in this case are as follows:

[5] In 1995, the defendant first met with Dato' Lim with regards to investing in Trimula, which was facing financial difficulties then. Sometime in March 1996, the defendant met with Dato' Lim and Tan Sri Dato' Sri Dr Hamid Pawanteh (PW3) (who was a director and shareholder of the plaintiff at the material times) to discuss the investment by Dato' Lim in Trimula. On 3 May 1996, the first advance of RM500,000 from the plaintiff was made to Trimula (that was the first time the plaintiff surfaced into the picture). On 28 June 1996, the second advance of RM500,000 was made by the plaintiff to Trimula. On 8 August 1996, there was a meeting between the defendant and Dato' Lim which resulted in a handwritten proposal and two counter proposals by the defendant. On 15 August 1996, the third advance of RM200,000 was made by the plaintiff to Trimula.

[6] On 4 September 1996, Dato' Lim's accountants forwarded their due diligence report on Trimula. In October 1996, the defendant requested further payment from Dato' Lim for Trimula as agreed in a meeting on 8 August 1996. Dato' Lim said he no longer had the money as he was then concentrating on another project. Due to Dato' Lim's refusal to abide by the agreement on 8 August 1996, the defendant on behalf of Trimula requested and received RM200,000 from PW3. In January 1997, Trimula was in a very bad shape and in desperate financial straits. The defendant again approached Dato' Lim. At a meeting, one Encik Ghazali Ariff (Dato' Lim's associate) handed the defendant a document and requested him (the defendant) to sign, in return for a further advance of RM1.5m to Trimula. The defendant refused to sign the document. Instead the defendant requested that the document be sent to his lawyers. On 4 February 1997, the plaintiffs' solicitors sent an unsigned draft of a call option agreement to the defendant's solicitors. Clause 3 of the draft call option agreement provides that the option was to expire on 30 June 1997. On the same date (4 February1997) the plaintiff made a further advance of RM1.5m to Trimula.

Thereafter, during the period of 27 February 1997 to 10 December 1997, the plaintiff's solicitors sent numerous reminders to the defendant asking for the executed copy of the call option agreement. No reply was forthcoming. On 30 June 1997, the call option exercise as stipulated in cl 3 of the draft call option agreement expired. Sometimes in January 1998, the call option agreement, only signed by the defendant, was forwarded to the plaintiffs' solicitors.

PLAINTIFF'S CASE

[7] From the re-re-amended statement of claim, the plaintiff's factual case may be summarised as follows:

(1) that the defendant was at the material time, specifically between the years of 1996 and 1997, a majority shareholder and director of Trimula;

(2) that the plaintiff through its directors and defendant discussed the possibility of an investment to be made by the plaintiff in Trimula;

(3) that the plaintiff had agreed with the defendant that the plaintiff's proposed investment would be in the form of the plaintiff purchasing part or all of the defendant's shares in Trimula;

(4) that the defendant, in mid 1996 had requested that the plaintiff make an advance payment to him, pending a final agreement being reached;

(5) that the plaintiff made advance payments totaling RM3,000,000 by December 1996. Upon the request of the defendant, these payment were made by the plaintiff to Trimula;

(6) that in early 1997, the basic commercial terms for the plaintiffs investment in Trimula were agreed and the plaintiffs' solicitors were requested to draft a call option agreement to bind both parties;

(7) that the call option agreement was sent to the defendant by the plaintiff's solicitors in early 1997. Following this, the defendant through his agent or by himself informed the plaintiff that he had signed the call option agreement on or about 4 February 1997; and

(8) that as a result of para 9.7 above, the plaintiff made a further payment of RM1,500,000 to the defendant in the name of Trimula under the call option agreement.

[8] The call option agreement in summary carried out the following terms:

(1) that the plaintiff be given an option to call on and purchase 3,004,800 ordinary shares of RM1.00 each in Trimula from the defendant;

(2) that the consideration for the option was the payment of RM1,608,000 paid by the plaintiff to the defendant before the date of call option agreement and a sum of RM3,217,000 paid to the defendant by the plaintiff at the date of the call option agreement, such sums being the deposit towards the total purchase price ('the Deposit');

(3) that the option for the plaintiff to call upon the defendant to sell his shares would expire on 30 June 1997; and

(4) if the completion of the sale and purchase of the shares pursuant to the call option agreement does not occur, or if it is terminated or if the defendant fails to sell the shares to the plaintiff, then the deposit is required to be returned upon demand, with interest on sums due to run at 9% per annum from 11 July 1998 until full payment.

[9] The plaintiff also contends that:

(1) the defendant only returned the call option agreement signed by him in or about January 1998, that is after the option period had lapsed;

(2) as such, the plaintiff was prevented from exercising its rights pursuant to the call option agreement as it was not returned within a reasonable time and accordingly the defendant evinced an intention to frustrate the call option agreement and as such the deposit is repayable;

(3) or that the call option agreement was never completed and as such the deposit is repayable;

(4) or the defendant had intentionally and wrongfully acted in breach of an express or implied term in the call option agreement by failing to return the call option agreement within a reasonable period and as such the defendant breached the same. Consequently, the plaintiff says that the deposit is repayable.

(5) or that by reason of the matter stated above, there is a failure in consideration and the deposit is repayable;

(6) or that by reason of the fact that the RM4,500,000 of the deposit was advanced by the plaintiff to Trimula at the request of the defendant and accordingly the defendant had and received that sum for his use. Consequently RM4,500,000 of the deposit is repayable by the defendant to the plaintiff; and

(7) or when the defendant refused to refund the deposit with interest thereon despite a demand by the plaintiff on or about 10 March 1998, the defendant was in breach of call option agreement and consequently the deposit is repayable.

[10] The plaintiff seeks one of two alternative sums for judgment:

(1) RM4,825,000, being the deposit; or

(2) RM4,500,000 being the advances paid to Trimula which forms part of the deposit; and

(3) interest not at 9% per annum as provided for in the call option agreement but at such sums deemed appropriate by this court.

DEFENDANT'S CASE

[11] Factually the defendant's case maybe summarised as follows:

(1) that the plaintiff's proposed investment in Trimula was to be by way of participation in a proposed enlarged capital of Trimula;

(2) that in accordance with that, the plaintiff made advances to Trimula and not the defendant, with a view that such advances would be later converted into share capital in Trimula. These advances without interest amounted to RM4,500,000;

(3) that in or about February 1997, the plaintiff made a proposal for the purchase of the defendant's shares in Trimula by way of a call option;

(4) that a draft unexecuted copy of the call option agreement, containing that proposal was forwarded by the plaintiff's solicitors to the defendant's solicitors on or about 4 February 1997 for the defendant's perusal. One of the terms contained in the draft call option agreement was that the option for the plaintiff to call on the defendant to sell his shares in Trimula would expire on 30 June 1997;

(5) that the draft call option agreement was forwarded to the plaintiff, executed only by the defendant in or about January 1998 by which time the option had expired. Until that time the plaintiff had no knowledge of the defendant's signature upon the document; and

(6) that at no time had the defendant accepted any monies from the plaintiff for his own use and neither had the defendant requested that any advances due to him be made to Trimula on his own behalf.

[12] Legally, the defendant contends:

(1) that the draft call option agreement which was forwarded on 4 February 1997 was an offer by the plaintiff ('the Offer');

(2) that the offer was only capable of being accepted by the defendant before 30 June 1997 (the date the call option expired);

(3) that as there was no communication of acceptance by the defendant before 30 June 1997, the offer was revoked by the plaintiff as the time prescribed to accept the offer, or reasonable time, had lapsed;

(4) that alternatively, the offer contained an implied condition that acceptance had to be before 30 June 1997 and that condition not having been satisfied, the offer ceased to be capable of acceptance; and

(5) that alternatively, the call option agreement forwarded on 4 February 1997 was an invitation to treat by the plaintiff and the offer was communicated by the defendant in or about January 1998, at which point it was incapable of acceptance as the call option was to expire on 30 June 1997;

(6) that the defendant did not have and receive any monies for his own use from the plaintiff;

(7) in fact and in law Dato' Lim was the alter ego of the plaintiff;

(8) that Dato' Lim was in fact operating as a moneylender without a licence, kin contravention of the Moneylenders Act 1951;

(9) that Dato' Lim used the plaintiff as a vehicle for his money lending activities; and

(10) that the plaintiffs claim upon the call option agreement is in fact a claim upon a sham or illegal contract, its object being in reality to secure payment of the advances made to Trimula with interest.

PLAINTIFF'S BURDEN

[13] In order for the plaintiff to succeed in it's claim against the defendant, it has the burden in law of proving the followings:

(1) that there was formed a valid and binding contract between the plaintiff and the defendant, which is the call option agreement;

(2) that the defendant either breached or frustrated the call option agreement, entitling the plaintiff to a refund of the deposit or that the call option agreement was never completed or lacked in consideration, entitling the plaintiff to a refund of the deposit; or

(3) alternatively, that the defendant had and received the sum of RM4,825,000 for his own benefit.

[14] On the other hand, if the defendant can show that no contract or agreement was in fact formed, there cannot be any question of a breach or frustration of the same, as either must predicated on the existence of a contract. Similarly, if there is no contract, there can be no question of a lack of consideration or non-compliance. As to whether the defendant had and received the sum of RM4,500,000, advanced by the plaintiff, the plaintiff must show that the defendant used the money for his own benefit.

[15] On the issue of the call option agreement the plaintiff's argument on the existence of a binding contract turns on three interconnected points, namely:

(1) either that there was a valid and binding contract by reason of the defendant's acceptance of the offer; or

(2) that the acceptance of the terms of the call option agreement was signified by the acceptance by the defendant of a further payment of RM1,500,00 to Trimula; or

(3) equity should not allow the defendant to renege on his agreement by his delivery of the executed call option agreement after the option had expired.

EVIDENCE AND LAW — ON THE CALL OPTION AGREEMENT

[16] The plaintiff contends that a contract was formed between the plaintiff and the defendant on or about 4 February 1997 when the defendant or his agent informed the plaintiff that the defendant had signed the draft call option agreement handed to the defendant by the plaintiff's solicitors on the same date (4 February 1997). In other words, the plaintiff alleges that the defendant accepted its offer as set out in the draft call option agreement and communicated this acceptance on or about 4 February 1997.

[17] As a matter of law, in this factual matrix, the forwarding of the draft call option agreement was an offer by the plaintiff to the defendant. In *Preston Corporation Sdn Bhd v Edward Leong & Ors* [1982] 2 MLJ 22 at p 23 it was held by the Federal Court that:

> An offer is an intimation of willingness by an offerer to enter into a legally binding contract. Its terms either expressly or impliedly must indicate that it is to become binding on the offerer as soon as it has been accepted by the offeree.

[18] The Law of contract also provides that not only must the offer be accepted, but that the acceptance must be communicated within a reasonable time or within such time as the offer is capable of being accepted. In *Lim Hwee Meng v Citadel Investment Pte Ltd* (1998) SLR 601one of the issues was, when an option agreement came into being. At the court below, the trial judge found that the agreement was formed when the defendant communicated his acceptance after the date of option lapsed. Lai Kew Chai J disagreed with the analysis and held at pp 613–614 that:

> An acceptance must be communicated to the offerer, otherwise there is no contract: *M'Iver v Richardson* (1813) 1 M & S 557. On the other hand, the trial judge observed that the communication had taken place only after the completion date specified in the option, 14 December 1992, had been allowed to pass. As such, the communication had only taken place after the offer had lapsed; the offer could not have extended beyond the completion date specified in the offer… The upshot of the trial judge's findings was that a contract had been concluded between the parties even though communication of the acceptance to the offeror had only taken place after the offer had lapsed. With respect, we encountered difficulties with this analysis.

[19] In *Ramsgate Victoria Hotel Company Limited v Montefliore* (LR) 1 Exch 109, it was held that the defendant was justified in not accepting the shares issued by the company as the company had not communicated its acceptance of the defendant's offer to buy the shares within a reasonable time.

[20] As a matter of fact and law, in the present case, it cannot but be the case that acceptance of the offer must be before 30 June 1997, as that is clearly set out in the draft as being the date when the option for the plaintiff to call upon the defendant to sell his shares to the plaintiff expires. Clearly any acceptance after this would be ineffective as the main purpose of the contract, namely the call option could no longer be exercised.

[21] The evidence in the present case is that the communication of the acceptance was only done in January 1998, that is some six months after the option under the draft call option agreement expired (on 30 June 1997). The evidence of PW1 and PW2 on this issue is unhelpful neither was involved at all in the events leading up to the draft call option agreement, nor events after which referred to the draft call option agreement. PW1 had this to say in cross-examination:

> This document was not written by me. It was passed to me at a later stage after proceedings commenced… I have no knowledge as to how this agreement came about. Until proceedings had commenced, I did not know about this document.

A **[22]** PW2, who was only the person in charge of accounts made no reference whatsoever to the call option agreement.

[23] The evidence of PW3 however is definitive. PW3 was a director and shareholder of the plaintiff at the material time. He is a witness called by the plaintiff. **B** In his evidence PW3 said:

> As at September 1997, I have not yet signed the agreement. The first time there is an indication that defendant had signed the agreement came by way of this letter dated 10 December 1997. I was not aware of this letter as at 10 December 1997 or thereabout. I may have executed this agreement after January 1998.

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[24] Clearly, even the plaintiff's witness (PW3), who much later executed the call option agreement agreed that communication of the acceptance by the defendant, at the very earliest came by way of a letter from the plaintiff's solicitors dated 10th December 1997, by which time the option under the call option agreement had **D** long expired.

[25] When the matter was put to DW1 in cross-examination, there was no issue as to the fact that the communication occurred well after the expiry of the call option period. His evidence on the issue is as follows —

E

> The call option has to be exercised by June 1997. I agree that the call option was not exercised because I did not return the call option before the expiry of the option.

[26] What is also important to note is the evidence as to why the defendant only **F** returned the call option agreement to the plaintiff's solicitors, in January 1998. It relates to the fact that the defendant insisted that one Dato' Sonny Cheah, a shareholder in Trimula and mutual friend of Dato' Lim and the defendant, to execute a guarantee and indemnity for sums that the plaintiff wanted the defendant to return pursuant to the call option agreement. The plaintiff had also sent **G** a draft of a guarantee and indemnity to be executed by Dato' Sunny Cheah. It is undisputed that the guarantee and indemnity was never executed by Dato' Sunny Cheah. In his evidence DW1 said:

> I asked my lawyers to withhold the agreement until Dato' Sunny Cheah signs the guarantee and indemnity.

H

[27] Clearly therefore, there was no acceptance to the offer and consequently there was no valid and binding contract as alleged by the plaintiff. There being no contract, these is also no question of breach nor frustration nor lack of consideration, nor non-completion of the call option agreement, entitling the plaintiff to claim **I** directly from the defendant.

[28] The plaintiff contends that *shortly after 4 February 1997, the plaintiff was informed by the defendant and/or his agent that the agreement had been signed by the defendant on/or about 4 February 1997.*

[29] There is no evidence to support this contention. The plaintiff had failed to adduce any evidence to show in what manner the information was made to the plaintiff; and if the information was made by the defendant's agent, the plaintiff has failed to identify and name the said agent.

[30] What is in evidence, however, is that the defendant communicated to Dato' Lim that the defendant wished his lawyer to advise him before he signed the call option agreement, which by no stretch of imagination can be said to be an acceptance. It should also be noted that as a matter of law, the defendant could have told any number of people of his acceptance of the call option agreement, including his lawyer, but if that is not communicated to the plaintiff (as the offeror), there is no valid acceptance, thus no binding contract.

[31] The other point raised by the plaintiff on this issue that the payment of a further advance of RM1.5m by the plaintiff and acceptance of it by the defendant amounted to acceptance of the call option agreement.

[32] It will be recalled that the plaintiff predicated its case, in the pleadings, upon the fact that the defendant had communicated acceptance on or about 4 February 1997 and it was upon this communication that the further sum of RM1.5m was paid. No communication had been proved. So now the plaintiff seeks to suggest that the acceptance occurred by the defendant accepting the RM1.5m. This is a substantive departure from the pleaded case. To support this claim, ie the acceptance of a further advance of RM1.5m by the defendant amounted to acceptance of the call option agreement. The plaintiff relies on the authority of *Lim Hwee Meng v Citadel Investment Pte Ltd* (1998) 3 SLR 601.

[33] The court finds that the *Citadel Investment case*, as cited by the plaintiff does not in any way help to support the said contention by the plaintiff. That part of the *Citadel Investment case* is easily distinguishable from the facts of the present case, as in that case, the cheque accompanying the option was offered only on condition that the offer contained in the option was accepted. In the present case, the evidence is that the defendant was given the draft call option agreement for him and his lawyer to consider, on or about 4 February 1997. Unlike the *Citadel Investment case* however, there was no condition attached when the cheque was made out to Trimula. Also unlike the *Citadel Investment case*, there is no evidence of the defendant's intention to be bound by the terms of the call option agreement at the stage when the payment of RM1.5m was made to Trimula. Also, unlike the *Citadel Investment case*, the defendant here had insisted on a guarantee to be executed by Dato' Sunny Cheah, which was never executed. The plaintiff's own document under which the cheque was delivered makes no reference to any condition upon which the money was paid to Trimula. The plaintiff's own document also records this payment as a loan to Trimula. It is also important to note that on the same date the cheque to Trimula was made out, a draft of the call option agreement was sent to the defendant's solicitors *for your perusal*. It therefore, cannot be said that the payment of the further RM1.5m to Trimula constituted an acceptance by the defendant of the terms of the call option agreement. This is especially so considering the background to the previous loans from the plaintiff to Trimula. Accordingly, the only reasonable

conclusion to reach is that as recorded by the plaintiff itself and as in the plaintiff's audited statutory accounts that the sum of RM1.5m was a loan to Trimula. It remains as a loan to Trimula until and unless the defendant had accepted the terms of the call option agreement. Thus, the evidence shows the defendant did not do so. Therefore the court is satisfied that, on the evidence, the call option agreement does not exist as a valid and binding contract between the parties and therefore not enforceable.

EVIDENCE AND LAW — ON MONEY HAD AND RECEIVED

[34] In order to recover the sum of RM4.5m from the defendant pursuant to the equitable remedy of restitution of money had and received, the plaintiff will have to demonstrate thre keys elements, namely:

(1) that the defendant must have been enriched by the receipt of a benefit;

(2) that the benefit must have been obtained at the plaintiff's expense; and

(3) that it would be unjust to allow the defendant to retain that benefit.

(see: Golf & Jones, *The Law of Restitution*, (5th Edi, Sweet & Maxwell) p 15)

[35] These three ingredients are closely inter related and cannot be analysed in complete isolation from each other. In the present case, there are two interconnected aspects upon which this plea must fail. Firstly, that the defendant derived no benefit personally and secondly that it cannot be said that it would be unjust to allow the defendant to retain the benefit when he did not take one.

[36] All the evidence, whether it be led by the plaintiff or the defendant and contemporaneous documents make it explicit that:

(1) the plaintiff or Dato' Lim at the time the advances were made to Trimula, were intent upon taking up a shareholding in an enlarged capital of Trimula and not purchasing the entire shareholding of the defendant;

(2) the plaintiff or Dato' Lim intended, at the time the advances to Trimula were made, to treat those advances as loans to Trimula which it would then convert into share capital in Trimula;

(3) the defendant, when requested the advances to Trimula, did so in his capacity as director of Trimula for the benefit of Trimula;

(4) no monies were ever sought by or paid to the defendant for his own benefit;

(5) all the advances were made directly to Trimula and booked into the accounts of the plaintiff as loans to Trimula; and

(6) all the advances were used exclusively by Trimula to pay its creditors.

[37] The evidence that the plaintiff or Dato' Lim at all times (up to the offer by way of the draft call option agreement) intended to invest in Trimula and take up new shares in its proposed enlarged capital, is consistent.

[38] The first part of this evidence may be found in the cross-examination of PW1. He was referred to a draft agreement prepared by Dato' Lim's solicitors for his company LGB Engineering Sdn Bhd. This draft agreement is to be found in AB-1 at p 75. There are some points to be made on this draft. They are:

(1) that it was an agreement between LGB Engineering Sdn Bhd and Trimula and not the defendant;

(2) recital B makes clear that it was Trimula who had requested LGB Engineering to invest in Trimula not the defendant;

(3) cl 1.1 makes clear that it was Trimula who had requested LGB Engineering to take up shares in Trimula, not the defendant offering to sell his shares; and

(4) cl 1.1 makes clear that it was Trimula and not the defendant that had requested the advances.

[39] It must be remembered that this draft is effectively the plaintiff's document. It was prepared by Dato' Lim's solicitor for his company LGB Engineering Sdn Bhd. PW 1 in cross-examination testified:

> Dato' Lim instructed me to prepare the agreement in 1996. At that time Trimula Development was urgently in need of funds to continue their development but then the proposal to Dato' Lim was not in place yet so as an interim measure Dato' Lim instructed me to propose this agreement to defendant for consideration while we carried out further due diligence.

[40] PW1 in his evidence also testified that the draft agreement was given to him by Dato' Lim and confirmed that the said draft was meant for Dato' Lim or his agent to invest in Trimula and have the capital enlarged and subsequently the purchaser would take up part of the enlarged equity. This fact is also confirmed by PW3 in his evidence. The defendant (DW1) also confirmed that this was the basis upon which the parties operated and testified without being shaken in cross-examination, that an agreement for the plaintiff to invest in Trimula by converting loans given and to be given into capital and paying the defendant an additional consideration was reached with Dato' Lim on 8 August 1996. There can be no doubt that Dato' Lim and the plaintiff had earlier agreed to treat the advances to Trimula as loans to Trimula itself. The plaintiff's witness and documents testify to that. First, there is the evidence of PW2, the accounts keeper for the plaintiff and IGB Engineering Sdn Bhd as well as security of Dato' Lim's personal accounts. When referred to the cheques for the advances of RM4.5m claimed by the plaintiff, she testified all these cheques were made out to Trimula Development Sdn Bhd and all the money was banked into Trimula and cleared by Trimula Development Sdn Bhd. When PW2 was referred to the vouchers of the plaintiff for the advances made to Trimula, which recorded the sums as loans to Trimula, she testified:

> These are internal approval vouchers prepared by me. All the monies to Trimula was recorded as loan from the plaintiff. All the details in the vouchers would be prepared first before Tan Sri (PW3) and Dato' Lim signed it.

A **[41]** The payment vouchers and the statement of accounts dated 30 June 1997 are all documents prepared by the plaintiff which unequivocally states the sum RM4.5m were loans to Trimula. There is also another document prepared by PW2 (exh AB-1 p 289) which dearly sets out that the sum RM4.5m were loans to Trimula and that together with interest of RM4,825,000 was due to the plaintiff from Trimula as at 30 June 1997. Apart from this, the evidence of PW2, clinches this issue in favour of the defendant beyond doubt. When PW2 was referred to the audited statutory accounts of the plaintiff for the relevant period in cross-examination, she testified:

B

> I was involved in preparing for this account. The loan to Trimula was booked under this heading - other debts and deposits. I agree that all four payments made to Trimula Sdn Bhd was loan made to Trimula Sdn Bhd

C

Finally, PW3 testified:

> I confirm that there was a meeting whereby Dato' Lim agreed to give loan to Trimula Sdn Bhd but I can't remember about the interest issue.

D

[42] The evidence of both the plaintiff and the defendant was that when the defendant asked for advances to be made to Trimula, he did so in his capacity as a director of Trimula for and on behalf of Trimula. There is no suggestion whatsoever that he asked for the monies due to him to be paid to Trimula.

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[43] The defendant in his evidence confirmed that in his dealings with Tan Sri (PW3) and Dato' Lim, he was always dealing on behalf of Trimula, not on behalf of himself. PW3 also in his evidence said:

F

> From the time I was Involved In the discussion, defendant had impressed upon Dato' Lim the need for Trimula for funds, for operating expenses, defendant had asked Dato' Lim to make advances to Trimula pending finalisation of the proposal for investment.

[44] All these evidence suggest that the defendant had never suggested any payments to be made to himself personally. Added to the evidence above, PW3 put the matter beyond issue when he testified that:

G

> No evidence to show that a sum of RM4,825,000 was paid by plaintiff to defendant. Based on the documents the sum of RM4,825,000 was never paid to defendant

H

[45] It will be recalled that the call option agreement provides that the sum was paid to the defendant. In the face of his earlier evidence PW3 was asked why he signed it. His answer appears to be:

> I may have executed this agreement after January 1998. It was because of carelessness on my part.

I

[46] There is one final evidential point to consider for this issue. It is that upon the plaintiffs own evidence all advances to Trimula were used exclusively by Trimula to pay its creditors. This was confirmed by PW2 in this testimony.

[47] All the evidence put beyond doubt that the plaintiff itself booked into account the advances made to Trimula as loans to Trimula. How can it now say otherwise?

[48] How can it be asserted that the defendant had and received the sum of RM4.5m to his own benefit?

[49] Clearly the advances were loans to Trimula and it is to Trimula that the plaintiff should look for its repayment. To put the matter beyond issue, Halsbury's Law of England (4th Ed, para 650) provides:

> For an action for money paid to a person's use to lie, it is essential that the payment should have been strictly for the use of the defendant

[50] On this ground alone, the plaintiff's claim against the defendant must fail.

EVIDENCE AND LAW — ON MONEY LENDING/SHAM CONTRACT

[51] The defendant also contended, in the alternative that the call option agreement was a sham agreement or illegal agreement used to cloak a moneylending, transaction by Dato' Lim as Dato' Lim did not have a moneylending licence under the Moneylending Act 1951.

[52] For the sake of completeness the court shall now deal with this alternative issue ie whether the call option agreement, assuming it to be valid and binding, was in fact and in law a sham agreement or an illegal agreement used to cloak a moneylending transaction by Dato' Lim, as Dato' Lim did not have a moneylending licence pursuant to the Moneylenders Act 1951. This consideration applies only, on the assumption that the call option agreement is held to be valid and binding on the parties.

[53] The burden of proving that the call option agreement was in fact and in law a sham agreement or an illegal agreement used to cloak a moneylendng transaction by Dato' Lim lies on the defendant.

[54] In order to succeed this issue, the defendant must show the followings:

(1) that the alter ego of the plaintiff was Dato' Lim and that he used the plaintiff as a vehicle for moneylending business;

(2) that Dato' Lim was a moneylender;

(3) that Dato' Lim was unlicensed under the Moneylenders Act 1951;

(4) that the true purpose of the call option agreement, if it is a valid contract is actually a moneylending transaction; and

(5) accordingly, the call option agreement is invalid.

[55] In the normal course of events the court will not lift the corporate veil and will treat a company such as the plaintiff as a separate legal entity. However, in certain

circumstances, such as unlawful activities, the court is prepared to go behind the veil to seek the person truly responsible. In one such case, *Waltersteiner v Moir* [1974] 3 All ER 217 at 237, Lord Denning had this to say:

> It is plain that Dr Wallersteiner used many companies, trusts, or other legal entities as if they belonged to him. He was in control of them as much as any 'one-man company' is under the control of the one man who owns all the shares and is the chairman and managing director. He made contracts of enormous magnitude on their behalf on a sheet of notepaper without reference to anyone else. Such as a contract on behalf of the Rothschild Trust to buy shares for Pound 518,786 15s or to vary it; or a contract on behalf of Stawa AGfora commission of Pound 235,000. He used their moneys as if they were his own. When money was paid to him for shares which he himself owned beneficially, he banked it in the name of IFT of Nassau. Such as the Pound 50,000 for the shares in Watford Chenical Co. Ltd. When he paid out money on personal loans by himself, he drew the cheques on the account in the name of IFT of Nassau. Such as the Pound 125,000 lent to Camp Bird to pay off the Pearl charge. His concerns always used as their bankers the Anglo-continental Exchange Ltd. That was a merchant bank in the City of London of which he was chairman and which he effectively controlled.
>
> Counsel as amicus curiae suggested that all these various concerns were used by Dr Wallersteiner as a fagade, so that each could be treated as his alter ego. Each was in reality Dr Wallersteiner wearing another hat. Counsel for Dr Wellersteiner repudiated this suggestion. It was quite wrong, he said, to pierce the corporate veil. The principle enunciared in *Salomon v. Salomon & Co Ltd* was sacrosanct. If we were to treat each of these concerns as being Dr Wallersteiner himself under another hat, we should not, he said, be lifting a corner of the corporate veil. We should be sending it up in flames.
>
> I am prepared to accept that the English concerns - those governed by English company Law or its counterparts in Nassau or Nigeria - were distinct legal entities. I am not so sure about the Liechtenstein concerns - such as the Rothschild Trust, the Cellpa Trust or Stawa AG. There was no evidence before us of Liechtenstein law. I will assume, too, that they were distinct legal entities, similar to an English limited company. Even so, I am quite clear that they were just the puppets of Dr. Wallersteiner. He controlled their every movement. Each danced to his bidding. He pulled the strings. No one else got within reach of them. Transformed into legal language, they were his agents to do as he commanded. He was the principal behind them. I am of the opinion that the court should pull aside the corporate veil and treat these concerns as being his creatures - for whose doings he should be, and is, responsible. At any rate, it was up to him to show that any one else had a say in their affairs and he never did so: cf *Gilford Motor Co, Ltd v Home.*

[56] What then is the evidence in this case? At the outset, it should be noted that the plaintiff will contend that it was at the time a joint venture company and that it was a company that had substantial business and interests. The plaintiff will argue that Dato' Lim was not the alter ego of the plaintiff.

[57] It is important to look at the evidence of this particular transaction for it wills how Lord Denning's words that Dato' Lim was *pulling the strings.*

[58] This evidence starts with PW1 when he was referred to LGB Engineering Sdn Bhd (which now is the only shareholder of the plaintiff) and other companies in the LGB Group. He said:

> Dato' Lim controlled all the companies in LGB Group.

[59] The second part of the evidence which is important is the proposal to invest in Trimula which was discussed with Dato' Lim personally. The evidence is that he would have used any of his vehicles for the purpose later. This is set out in the evidence of PW 1 who speaks through his cross-examination of taking instructions on this 'project' from only one person - Dato' Lim. It is only his name that is mentioned. And, when it came to which vehicle was to undertake the investment. PW 1 said that:

> At that stage Dato' Lim was thinking was that the party to take part was LGB Engineering Sdn. Bhd.

[60] This is reinforced by PW3 when he gave evidence of the plaintiff's involvement. PW3 testified that:

> My understanding at that time is that Trimula is a deal between defendant and Dato' Lim.

[61] When it came to the call option agreement, PW3 testified that:

> I don't recall any draft of this agreement discussed at any meeting at my house. All documentations were done at Dato' Lim's office at LGB Engineering.

[62] Critically, PW3, who affirmed affidavits in these proceedings as well as signing the call option agreement, gave evidence that Dato' Lim asked him to sign the call option agreement and was told by Dato' Lim that 'the documents were in relation to money advanced to Trimula Sdn Bhd.'

[63] The controlling mind of the plaintiff in respect of this transaction was Dato' Lim and no one else. When it came to financing the plaintiff at the relevant time and in particular for the transaction, the only person who controlled the finances was Dato' Lim. The evidence begins with PW1's confirmation that Dato' Lim controlled LGB Engineering Sdn Bhd. It followed by PW2 who testified that a part from one payment, 'the money paid to Trimula was from LGB Engineering Sdn Bhd,' and 'all payments from LGB 46 Engineering would have to be approved by Dato' Lim.' PWS's evidence on this is even more compelling. In his evidence in chief he said of an affidavit he affirmed in interlocutory proceedings:

> The purpose of the affidavit was to recover money channeled through the plaintiff to the defendant."
>
> In cross-examination, PW3 testified that:
>
> 'During the period, financing of the plaintiff only came from loan from LGB Engineering Sdn Bhd. Dato' Lim controlled LGB Engineering Sdn Bhd.

[64] All the evidence in the present case if read as a whole points to only one person making the decisions relating to the said advances -ie Dato' Lim and no one else.

[65] The next issue is whether Dato' Lim was a moneylender and whether he was licensed under the Moneylending Act 1951 (the Act). Section 15 of the Act provides:

No moneylending agreement in respect of money lent after the coming into force of this Act by unlicensed moneylender shall be enforceable.

[66] Section 2 of the Act defines 'moneylender' as -

every person whose business is that of moneylending or who carries on or advertise or announces himself or holds himself out in any way as carrying on that business whether or not that person also possess or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent.

[67] Section 3 raises the following presumption:

Certain persons and firms presumed to be moneylenders. Save as excepted in s 2A(1) and s 2A(2), any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender.'

[68] Section 2A(1) of the Act provides exceptions to s 15, including:

(a) any authority or body established, appointed or constituted by any written law, including any local authority;

(b) any co-operative society registered under the Co-operative Societies Act, 1948;

(c) any bank or merchant bank licensed under the Banking and Financing Institutions Act, 1989 or any bank licensed under the Islamic Banking Act, 1983;

(d) any insurance company licensed under the Insurance Act, 1963;

(e) any company licensed under the Takaful Act, 1984;

(f) any pawnbroker licensed under the Pawnbrokers Act, 1972;

(g) any licensed finance company as defined in s 2(1) of the Banking and Financial Institutions Act, 1989; or

(h) any person bona fide carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money.

[69] There are two ways to prove that a person is a moneylender. One may either rely on the presumption provided in s 3 which is rebuttable or show 'some degree of system or continuing'. The Privy Council in *Chow Young Hong v Choong Fah Rubber Manufactory* (1962) 28 MLJ 74 at p 77 had this to say:

In order to prove that a man is a moneylender within the meaning of the (Moneylenders) Ordinance, it is necessary to show some degree of system and continuity in his moneylending transactions. If he were left to discharge this burden without the aid of any presumption, a defendant might have had only one or two transactions with the moneylender and he might find it difficult to obtain evidence about the business done by the moneylender with other parties. Section 3 enables a defendant to found his claim on proof of a single loan made to him at interest, it being presumed, in the absence of rebutting evidence, that there were sufficient other transactions of a similar sort to amount to a carrying on of business.

[70] In the present case, the plaintiff concedes that although the call option agreement mentions that the deposit was RM4,825,000, in actual fact only RM4,500,000 was paid out. The plaintiff also accepts that the difference was interest. Therefore, the presumption under s 3 of the Act may apply ie any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary be proved to be a moneylender.

[71] The plaintiff will seek to rebut the presumption on the basis that the plaintiff is engaged in other substantial business and that this was purely an investment or is covered by the exemption in s 2(a)(h) of the Moneylenders Act 1951.With respect if the corporate veil is lifted (as in the present case) and the evidence as to the true purpose of the call option agreement is analysed, this argument does not rebut the presumption as it was Dato' Lim who was the unlicensed moneylender and not the plaintiff.

[72] In any event, the evidence is compelling that there is some degree of system and continuity in Dato' Lim's moneylending activities. The evidence begins with PW1 who said:

> I agree Dato' Lim had lent money to third party without moneylending licence.

PW3 gave more basis to the allegation. He testified that:

> Dato' Lim lent me money and charged interest I don't recall whether it was lent to me by Dato' Lim personally or by his company. There was one big and several small ones.

In re-examination, PW3 was asked again about this. He testified that:

> I remembered a loan given to me by Dato' Lim personally where RM8m which was given and I have to pay RM10m.

[73] Apart from this, the defendant had also led evidence of three further loans granted by Dato' Lim for which he charged interest. There is also documentary evidence of these loans (all to Dato' Sunny Cheah) in the form of written agreement (exh AB-2 at pp 1–23). The above evidence satisfactorily show that Dato' Lim was an unlicensed moneylender.

[74] The next issue is whether the call option agreement was a moneylending device.

[75] It will be recalled that the evidence thus far demonstrates that:

(1) Dato' Lim through the plaintiff gave loans to Trimula to be converted to shares;

(2) that by September 1996 he had decided to renege on the agreement of 8 August 1996 and that he no longer wished to invest as he was injecting funds into another project; and

(3) Dato' Lim was always aware of Trimula's precarious financial position and no doubt was aware that recovery of monies from Trimula would be difficult.

[76] It was against this background that the call option agreement was proposed in essence it allowed for:

(1) the plaintiff to purchase the defendant's shares in Trimula;

(2) the plaintiff to elect not to purchase the shares;

(3) the plaintiff to treat the defendant as the recipient of the sum of RM4,500,000;

(4) made provision for interest to be calculated from the date of the first advance on 3rd June 1996 to 30 June 1997, the date of expiry of the call option agreement; and

(5) make the defendant liable for the whole sum.

[77] What really demonstrates the true purpose of the call option agreement is the document showing the interest rate calculation prepared by PW 2 at AB-1 p 289. A careful study shows that interest on the loans to Trimula was calculated until 30 June 1997. The total figure owing was calculated at RM4,825,000 and this was the figure inserted into the draft on February 1997. Given the fact that Dato' Lim intended not to further invest, clearly he intended not to exercise the option to purchase the defendant's shares but instead to demand the sum of RM4,500,000 loaned to Trimula together with interest of RM325,000 from the defendant.

[78] PW3 further confirmed in cross-examination that the call option agreement did not reflect the actual position. He testified upon the call option agreement that:

> Based on the documents the sum RM4,825,000 was never paid to the defendant.

[79] As such, whilst the call option agreement appears prima facie to be about the purchase of the defendant's shares, given that Dato' Lim was meant to convert the loans into shares and given that he no longer wished to invest in Trimula, the true purpose of the call option agreement was to allow him to recover monies lent to Trimula from the defendant with interest. The call option agreement is therefore a sham agreement. The Court of Appeal in *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* (2001) 1 MLJ 324 at p 332 adopted the following definition of a sham agreement:

> Counsel for the appellant made two submissions on this point which I consider to be important. His first submission is that evidence is admissible to show that a transaction is a sham. He says that he is using the expression 'sham' in the limited sense ascribed to it by Lim Beng Choon J in *Kuppusamy v Anggammah & Anor* (1992) 1 MLJ 602 at p 620:
>
> 'Even if I am wrong in holding that the plaintiff's June 1986 agreement is invalid, I have no hesitation in holding that the said tenancy agreement is a sham agreement deliberately entered into between Ramasamy and the plaintiff to deprive the rights of the second defendant as landlord of the plaintiff. 'Sham' has been defined as 'a false label in which the express purpose does not correspond with the true purpose.' The clearest statement of the principles was what provided by Diplock LJ in *Snock v London and West Riding Investment Ltd* (1967) 2 QB at p 802.

act done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create. But one thing, I think, is clear in legal principle, morality and the authorities (see: *Yorkshire Railways Wagon Co v Maclure* (1982) 21 Ch D 309 and *Stoneleigh Finance Ltd v Phillips* (1965) 2 QB 537), that for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived.

[80] The court in order to determine whether a document or transaction is a sham ought to have regard to all the circumstances, both before and at the time of the execution of the document or creation of the transaction.

[81] Accordingly, if the true purpose of the call option agreement is revealed and the corporate veil is lifted, the court is satisfied that the transaction in question was a moneylending transaction where the call option agreement was a moneylending contract which is unenforceable. Therefore, this is an appropriate case to lift the corporate veil. On all the evidence, the court is fully satisfied that the call option agreement was a moneylending transaction by Dato' Lim. This sham contract is not enforceable because Dato' Lim is not a licensed moneylender under the Act.

[82] The plaintiff submits that:

(1) section 2A(1)(h) of the Act applies in that the plaintiff is bona fide carrying on business whose primary object is not the lending of monies, in the course of which the plaintiff lends money;

(2) the common intention of both parties was to have an agreement to invest in Trimula and accordingly the call option agreement was not a sham.

[83] The court cannot agree with the plaintiff on this issue. The plaintiff fails to understand the nature of the defendant's moneylending argument. It is not that the plaintiff was a moneylender but that Dato' Lim was the alter ego of the plaintiff and used the plaintiff for his money lending activities. The moneylender was Dato' Lim, not the plaintiff. The defendant has set out in the defendant's submission substantial evidence that Dato' Lim was in the business of moneylending. Even the plaintiff's own witness concedes to this. The evidence is also clear that the amount sought to be claimed under the call option agreement is derived from the amounts loaned to Trimula plus interest. The plaintiff's own document speaks of this. Critically, the plaintiff has not led any evidence that it intended to exercise the option said to have been granted under the call option agreement. The plaintiffs own witnesses also say that Dato' Lim controlled the financing for this transaction.

[84] The court is satisfied that Dato' Lim was the alter ego of the plaintiff and the call option was merely a device for him to recover monies lent to Trimula with interest and as such s 2A(1) of the Act does not apply in relation to the plaintiff.

[85] As to the common intention of both parties to invest in Trimula, the evidence is clear that by October 1996, Dato' Lim had stopped making any payments to Trimula and did not intend to invest in it any further. There is also no evidence that the plaintiff ever intended to exercise the option under the call option agreement to purchase the defendant's shares. Indeed, instead of attempting to call on the option before 30 June 1997, the only interest of the plaintiff from February to December 1997 was whether or not there were any comments on the draft call option agreement or whether it had been signed. There was no intention therefore to exercise the option.

[86] That being the case the court is satisfied on the balance of probabilities that there was no common intention as at February 1997 for the plaintiff to invest in Trimula. On the contrary as the institution of this action has shown, the intention was to recover money with interest from the defendant.

PLAINTIFF'S ARGUMENT ON UNPLEADED ISSUES

[87] The plaintiff argued that there are three issues which have not been pleaded by the defendant and upon which the defendant cannot rely on. They are:

(1) the fact that Trimula was in financial distress;

(2) that there was no guarantee by Dato' Sunny Cheah; and

(3) that there was an agreement to invest on 8 August 1996.

[88] In *William v Wilcox and Anor* (1835 to 1842) QB 25at 27 it was held:

> It is on elementary rule in pleading that, when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it or the evidence sustaining the allegation.

These three evidential elements go to show:

(1) it was because Trimula was not liquidated that the plaintiff /Dato' Lim wanted to make the defendant liable for the loans granted to Trimula. Accordingly, the call option agreement was a sham;

(2) the draft call option agreement was only an offer by the plaintiff that the defendant did not accept. One of the reasons that the defendant did not accept it was because Dato' Sunny Cheah did not execute a guarantee; and

(3) it was because of Dato' Lim's departure from the agreement on 8 August 1996 that he then decided upon the device of the call option agreement to recover money with interest.

[89] In short, the main facts have been pleaded and the defendant has led evidence to support it. It is trite that evidence need not be pleaded.

PLAINTIFF'S ARGUMENT ON SECTION 114(G) OF THE EVIDENCE ACT 1950

[90] In its submissions the plaintiff made broad reference to s 114(g) of the Evidence Act 1950 implication in the defendant not calling his lawyer, Mr Loh Siew Cheang and Dato' Sanny Cheah as his witnesses to testify in court.

[91] On this point the court would rely 'on the decision in *Selvaduray v Chinniah* [1939] MLJ 253, where it was held that the burden of proof not being on the defendant, his failure to call a material witness would not raise an adverse presumption under s 114 of the Evidence Act. At p 255, Terrell, Ag CJ had said the followings:

> It is no doubt true as mentioned above that if the defendant had been the claimant, he could not have hoped to satisfy the court, if he failed to call the witness with whom he alleged that the negotiations on behalf of the plaintiff were conducted. The reason for that would be that the court is entitled to the best evidence available before it can be called upon for a decision, and if a plaintiff failed to call a material or essential witness it is almost inevitable that his claim would be rejected. But it is a very different thing to suggest that in a case where the onus probandi was not on him but on the other side, a failure to call a material witness would result in the same fatal consequences. As I have pointed out, although the establishment of the defendant's version would necessarily be conclusive against the plaintiff, a failure to establish it is by no means conclusive in the plaintiff's favour. The plaintiff must prove his case and it is sufficient for the defendant if the plaintiff fails to do so.

The learned judge further held:

> It was quite competent for the defendant's counsel at the trial to decide that he had enough evidence to defeat the plaintiff's claim without substantially establishing the defendant's version…

[92] Two points emerge from the above passage. First, where the onus is on the plaintiff to prove a point and he does not do so, the failure of the defendant to call a witness on that issue cannot be held against them. Second, the witness to be called must be a material witness.

[93] In the present case, the first question to be asked is whether the plaintiff has discharged the burden of proof, such that the two witnesses, ie Mr Loh Siew Cheang and Dato' Sanny Cheah should have been called by the defendant as witnesses. The second question is whether these witnesses are material witnesses.

[94] First to Mr Loh Siew Cheang. He was the defendant's lawyer at the time of the draft call option agreement. The plaintiff had not proved that there was an acceptance of the call option agreement or that Mr Loh Siew Cheang was at all material to this issue. Accordingly there is no reason for the defendant to call him as a witness.

[95] Second, to Dato' Sanny Cheah. It is the burden of the defendant to prove the existence of the agreement of 8 August 1996. This has been satisfied by the defendant. The first time the defendant made reference to this matter was in his affidavit of 18 December 1998. It was made soon after the proceedings had begun and it was set out in great detail. DW1's evidence was that this document was on thermal fax paper which had faded substantially by 8 December 1998 and had since been destroyed in a flood. The question to asked is how could the defendant be making up such detailed document if it did not in fact exist. Obviously it did.

[96] Further it should be noted that the loans to Trimula subsequent to the agreement of 8 August 1996 in entirety consistent with the agreement under the heading 'consideration' in that the plaintiff advanced RM2m in August 1996 but reneged on the agreement in October 1996. All the evidence point towards the existence of the said agreement of 8 August 1996. That being the case, there is no requirement for any other witness to be produced to prove what has already been proven.

CONCLUSION

[97] For all the reasons set out, the court is satisfied on the balance of probabilities that the plaintiff failed to prove its claim against the defendant. Therefore, the plaintiff's claim is dismissed with costs.

Plaintiff's claim dismissed with costs.

Reported by Peter Ling